KLASS CORPORATION (M) SDN BHD v. MKRS MANAGEMENT SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
[CIVIL APPEAL NO: 12AC-17-12-2015]
29 FEBRUARY 2016

CIVIL PROCEDURE: *Amendment – Defence – Application to amend defence after commencement of trial – Whether explanation for delay reasonable – Whether application bona fide – Whether application prejudicial on other party – Whether other party could be compensated with costs – Whether application tactical manoeuvre to disguise counterclaim*

The respondent's ('plaintiff') claim arose from the terms and conditions set out in a quotation dated 10 June 2014 ('final revised quotation') which was duly accepted by the appellant ('defendant') *vide* its purchase order dated 11 June 2014. Accordingly, the plaintiff supplied workers and installed scaffolding and charged rent for the installed scaffolding. The plaintiff then issued its invoices supported by contemporaneous documentation which showed the work was done at the defendant's request and as approved by the defendant. Subsequently, the plaintiff sued the defendant for the balance sum of RM715,381.79 being charges due and owing to it for the supply of labour, construction and letting of erected tabular scaffolding to the defendant. The suit was filed in the Sessions Court in April 2015. The defendant filed its defence stating, *inter alia*, that the billing had not captured the correct quantity and measurement of scaffolding supplied and that the calculation of the charges was not in accordance with the purchase order. Thereafter, not less than six case management dates were fixed for the parties to comply with the directions of the Sessions Court Judge ('SCJ') for trial. However, on the first day of trial, after PW1 had completed his evidence-in-chief, the defendant served on the plaintiff an unsealed application to amend its defence ('application'). The new paragraphs sought to amend the defence filed to introduce the element of set-off as well as to plead that the billing had not been in accordance with 'the construction industry practice generally and the supply of tabular scaffolding specifically'. The SCJ dismissed the defendant's application. Hence, the present appeal by the defendant against the dismissal. The issues that arose for determination, *inter alia*, were (i) whether the defendant's application was *bona fide*; (ii) whether there was reasonable explanation for the delay; (iii) whether the application prejudiced the plaintiff; (iv) whether prejudice caused to the plaintiff could be compensated with costs; and (v) whether the proposed amendment changed the character of the defence.

Held (dismissing appeal with costs):

(1) Any amendment application has to be made at the earliest opportunity. On the facts, it was made at the eleventh hour on the first day of trial. The law is not so harsh as to punish a mere innocuous inadvertence but it is not sympathetic to a shoddy preparation that stumbles across a defence or particulars of it, previously not known to the defendant itself as declared in this case. (para 17)

(2) The defendant had failed to give a reasonable explanation for the delay in making the amendment application. That was fatal and the application would fall flat. It was woefully inadequate and wanting for the defendant to explain that it only came across the defence of billing not according to industry practice when the so-called discovery was made that plaintiff had billed according to volume in meter cube. The final revised quotation from the plaintiff to the defendant clearly showed the quotation in cubic meter. Likewise, the defendant's purchase order to the plaintiff also referred to the measurement of the scaffolding in terms of cubic meter. Further, the plaintiff's invoices that were in the defendant's possession and some payments made were all based on cubic meter. For the defendant to wait almost five months and then to say that they had stumbled upon an important discovery of something amiss in the method of billing was stretching credibility to its limits. The late application with no reasonable explanation smacked of a lack of *bona fides* in making the application and should stand dismissed. (paras 19, 22, 27 & 28)

(3) The defendant's late application for amendment which, if allowed, would cause the trial to be further delayed, was a prejudice to the plaintiff. No longer may a court simply dismiss the delay caused arising out of such a late amendment as merely a prejudice that can always be compensated by costs. Costs alone cannot make prejudice caused more prosaic or palatable. It cannot always atone for or assuage the deleterious delay that has resulted in the prejudice. (paras 37 & 41)

(4) In none of the contemporaneous documents exhibited was there any reference to a set-off. Neither was there any reference to the plaintiff's invoices being defective. The new allegations would go against the grain of the defendant's own contemporaneous documents and pleaded defence. The so called set-off is more of a tactical manoeuvre to disguise what is in reality a counterclaim so as to avoid the obvious pitfall of making an application for amendment to add a counterclaim after trial has proceeded. It is tantamount to shifting the goalpost after trial has started and the match as it were, has begun. Therefore, the Sessions Court Judge had correctly dismissed the defendant's late application for amendment of its defence. (paras 45 & 47)

Case(s) referred to:

Anthony Wee Soon Kim v. UBS AG (No 2) [2003] 2 SLR 554 ***(refd)***
Everise Hectares Sdn Bhd v. Citibank Bhd [2011] 2 CLJ 25 CA ***(refd)***
Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal [2015] 8 CLJ 1 FC ***(refd)***
K Rajashekar Kanapathy & Ors v. Palm Court Condominium - JMB & Ors [2014] 10 CLJ 391 HC ***(refd)***
Kaplands Sdn Bhd v. Lee Chin Cheng Dengkil Oil Palm Plantations Sdn Bhd [2000] 4 CLJ 281 HC ***(refd)***
Ketteman and Others v. Hansel Properties Ltd [1988] 1 All ER 38 ***(refd)***
Kuala Lumpur City Securities Sdn Bhd v. Cheong Chai Hoo [2004] 2 CLJ 891 HC ***(refd)***
Lembaga Pelabuhan Johor v. The Pacific Bank Bhd [1998] 1 CLJ 742 HC ***(refd)***
Raphael Pura v. Insas Bhd & Anor [2000] 4 CLJ 830 CA ***(refd)***
U-Meng Holdings Sdn Bhd & Anor v. Tan Sri Datuk Ibrahim Mohamed; Ambank (M) Bhd (Third Party) [2010] 9 CLJ 411 CA ***(refd)***
Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 20 r. 5, O. 34 rr. 2(2)(p), (q), (r), O. 40A, O. 55 r. 2

For the appellant/defendant - G Nanda Goban (Siva Shankar with him); M/s Goban & Company
For the respondent/plaintiff - G Rajasingam (M Rajkumar with him); M/s Nora Hayati Raj

[Editor's note: Appeal from Session Court; Suit No: B52C-6-04-2015]

Reported by Sandra Gabriel

JUDGMENT

Lee Swee Seng J:

[1] The plaintiff had sued the defendant for the balance sum of RM715,381.79 being charges due and owing to it for the supply of labour, construction and letting of erected tabular scaffolding to the defendant. The suit was filed in the Sessions Court in April 2015.

[2] The basis of this claim arises from the terms and conditions set out in a quotation No. MKRS/016/14/kcsb/quo1/rev1 dated 10 June 2014 ("quotation" marked as exh. P-1 at trial) which was duly accepted by the defendant *vide* its purchase order No. 0567 dated 11 June 2014 ("purchase order" marked as exh. P-2 at trial). These documents are collectively marked as exh. "KS-1" and "KS-2" to the plaintiff's affidavit respectively. (See pp. 103-105 and p. 107 of the appeal record respectively).

[3] Subsequent thereto, the plaintiff supplied workers and installed scaffolding and charged rent for the installed scaffolding. After that the plaintiff issued its invoices which were supported by contemporaneous documentation which showed the work was done at the defendant's request and as approved by the defendant. Such documents included the 'scaffolding

completion form', 'manpower form' and or 'delivery order' (collectively referred to as "site inspection forms" or "SI forms"). A sampling of the SI Forms are in exh. "KS-3" to the plaintiff's affidavit and marked as exh. P12 and P13 at trial. (See pp. 109-132 appeal record).

[4] The defence filed was that the billing had not captured the correct quantity and measurement of scaffolding supplied and that the calculation of the charges is not in accordance with the "purchase order" and further that there had been tampering of the relevant SI forms countersigned by the defendant confirming the work done.

[5] Thereafter no less than six case management dates were fixed for the parties to comply with the directions of the Sessions Court Judge ("SCJ") for trial. Trial was finally fixed on 23 and 27 November 2015 and further on 1, 4, 14 - 16 December 2015. The plaintiff therefore prepared for trial focusing on proving that there had been no dispute on quantity and measurement with respect to height and that the defendant's agents having signed the relevant SI forms confirming the extent of work done, they are estopped from contending otherwise.

[6] On the first day of trial, PW1 completed his evidence-in-chief. It was then that the defendant served on the plaintiff an unsealed application to amend the defence. The trial had to be adjourned to enable the defendant's application for amendment to be heard. On 4 December 2015 the court dismissed the defendant's application.

Prayer

[7] The new paragraphs sought to amend the defence filed to introduce the element of set-off as well as to plead that the billing had not been in accordance with "the construction industry practice generally and the supply of tabular scaffolding specifically."

[8] The defendant is now appealing against that decision dismissing the defendant's application to amend filed at the eleventh hour and served on the plaintiff after trial had started. As provided for under O. 55 r. 2 of the Rules of Court 2012 ("ROC 2012"), this appeal to the High Court from the decision of Sessions Court is by way of re-hearing.

Principles

[9] One cannot deal with the issue of amendment of pleadings without referring to the Federal Court's decision in *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 at pp. 428-429 and to the *dicta* of His Lordship Mohd Azmi FJ:

> The general principle is that the Court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be determined whether injustice would or would not result, (1) whether the application is *bona fide*; (2) whether prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in

effect turn the suit from one character into a suit of another character and inconsistent character. (See *Mallal's Supreme Court Practice* p.342). If the answers are in the affirmative, an application for amendment should be allowed at any stage of the proceedings particularly before trial, even if the effect of the amendment would be to add or substitute a new cause of action, **provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action** in respect of which relief has already been claimed in the original statement of claim. (emphasis added)

[10] The test in *Yamaha Motor*'s case *(supra)* has been modified by the recent Federal Court's case in *Hong Leong Finance Bhd v. Low Thiam Hoe & Another Appeal* [2015] 8 CLJ 1. The principles that may be gleaned from the *Hong Leong Finance*'s case *(supra)* are as summarised in the headnotes of the report as follows:

(1) The principles in *Yamaha Motor*'s case were laid down in respect of an application to amend that was made at an early stage of the proceedings in particular before the trial commences. The Court of Appeal fell into an error of law when it applied the principles in *Yamaha Motor* without appreciating that those principles were insufficient to deal with an application to amend, which introduced two new defences on the eve of a trial. (paras 16 & 29).

(2) *Yamaha Motor* was decided under the old Rules of the High Court 1980. The civil procedure has since then changed with he introduction of the pre-trial case management. Under the new case management regime the court recognises that a different approach needs to be taken to prevent delay in the progress of a case to trial. The management of cases by the courts prior to the trial is intended to ensure 'just, expeditious and economical disposal' of an action. (paras 18 & 26).

(3) When an application to amend a pleading is made at a very late stage, the principles in *Yamaha Motor* ought not to be the sole consideration. This was because an order for compensation by payment of costs in such a case may not be an adequate remedy and it would also disrupt the administration of justice. There had been five case managements since 2011 and there was no indication at all that an amendment application was contemplated by the defendant. (paras 18 & 27).

(4) The Court of Appeal failed to appreciate that Low bears the burden of producing material and cogent reasons to explain why the change was sought so late and was not sought earlier. In the defendant's affidavit-in-support, all that was stated was that he had only realised that important issues, namely the first and second proposed amendments were not pleaded when he was preparing for trial. Such an explanation could not be accepted. (para 29).

(5) The defendant's affidavit-in-support failed to adduce an explanation for the delay in filing the said application. The Court of Appeal erred in holding that the plaintiff should have filed an affidavit to oppose the application to amend since the defendant's affidavit in support contained nothing more than a bare assertion. A bare assertion carries no evidential

A value and hence, there was nothing to reply. Low's affidavit also did not discharge the heavy onus imposed on the amending party as Low did not disclose any material and cogent reasons to explain the inordinate delay. (para 30).

[11] There is a palpable and indeed purposeful paradigm shift under the B ROC 2012 under the new regime of proactive case management by the courts such that a late application to amend especially on the eve of a trial or after a trial has commenced would not be viewed favourably by the courts. The courts in the light of the *Hong Leong Finance*'s case *(supra)* are enjoined to factor in delay caused by the party's late application to amend as part of the C overall considerations to be taken into account in determining where the justice of the case lies with respect to such an application in the context of a just, expeditious and economical disposal of a case.

[12] The various considerations involved are now discussed below.

D **Whether The Defendant's Application To Amend Its Defence After Trial Has Proceeded Is *Bona Fide* And That The Delay Is Reasonable**

[13] Order 20 r. 5 of the ROC 2012 provides that the court may at any stage of the proceedings allow any party to amend his pleading on such terms as to costs or otherwise as may be just and in such a manner, if any, as it may E direct.

[14] Whilst an application to amend may be made at any stage of the proceedings, the discretion lies with the court taking into consideration a host of factors in deciding whether or not the amendments should be allowed. The Court of Appeal in *Raphael Pura v. Insas Bhd & Anor* [2000] 4 CLJ 830; [2001] F 1 MLJ 49 at p. 838 (CLJ); p. 55 (MLJ) had this to say on O. 20 r. 5:

> It should be noted that an application for amendment of a writ or pleading is not as a matter of right of a party but is left to the judicial discretion of the court depending on the circumstances of each case.

[15] In *Kaplands Sdn Bhd v. Lee Chin Cheng Dengkil Oil Palm Plantations Sdn* G *Bhd* [2000] 4 CLJ 281 the High Court held at p. 288 as follows:

> ... it is the law that where there has been a long delay in applying for leave to amend a pleading, there must be an affidavit to explain the delay; except in cases where the amendment is plainly and obviously trivial in nature or where the opposite party does not oppose the application. Only H if there is an explanation by way of an affidavit will the court be in a position to assess and decide whether in the circumstances leave to amend ought to be granted or not ...

[16] It is axiomatic that the longer the delay the more cogent and convincing the reasons must be explaining the cause of the delay. It is only I too evident that an application to amend one's pleadings either just before trial or after trial has started, has a disruptive effect on the trial, often derailing and delaying it further. It is dissipating and diffusing of time and energy that should be directed and devoted towards the diligent disposal of

the dispute. Precisely because of this deleterious effect that a late application for amendment has on a trial, it is often associated with a lack of good faith unless the delay is excusable as in having been sufficiently explained.

[17] Any amendment application has to be made at the earliest opportunity. Here, it has not been and more than that, it has been made at the eleventh hour on the first day of trial after the plaintiff's first witness had given his evidence in examination-in-chief. Whilst deadlines may be just datelines especially if parties agree to extend it by mutual consent, it has dire consequences when the delay is devoid of a decent explanation. The law is not so harsh as to punish a mere innocuous inadvertence but it is not sympathetic to a shoddy preparation that stumbles across a defence or particulars of it, previously not known to the defendant itself as declared in this case. The timeline that leads finally to a trial taking off is a reasonably good test as to whether a party has been guilty of deliberate or deleterious delay.

[18] Here the statement of claim was served on the defendant on 28 April 2015. Since that date, almost seven months had lapsed before trial commenced. In between, there were six case management dates. Since the filing of the defence, there were five case management dates.

[19] The amendment was made on the first day of trial after trial had commenced on 23 November 2015, not to mention that the suit had previously been set down for trial to commence on 19 and 20 October 2015. It was adjourned as learned counsel for the defendant was unwell. The defendant in its affidavit in support has failed to give a reasonable explanation for the delay in making this amendment application. That is fatal and the application would fall flat. It is woefully inadequate and wanting for the defendant to explain that it only came across the defence of billing not according to industry practice when the so-called discovery was made that plaintiff had billed according to volume in meter cube.

[20] Gone are the days when the file moves according to the timetable of the parties. Under the revamped ROC 2012, the court would proactively manage the files so as to get them ready for trial and to dispose of them, as far as possible, within nine months of filing. This has been proved possible through the cooperation of counsel not to ask for any adjournments save for the most extenuating of human circumstances. No longer may a lawyer double-park or triple-park cases for trial in his diary for he can no longer use one case to postpone another.

[21] The case of *K Rajashekar Kanapathy & Ors v. Palm Court Condominium - JMB & Ors* [2014] 10 CLJ 391; [2014] 9 MLJ 297 captures the current attitude of the court towards a late amendment application as follows:

> (1) The court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it. The later an

A application is made, the stronger would be the grounds required to justify it. The delay must be explained and justified. A failure to explain the delay is fatal especially where the amendments sought are substantial in nature. Last minute applications are to be discouraged as they would inevitably entail an adjournment, and an award of costs may not adequately compensate someone who is desirous of concluding a piece of litigation B which has been hanging over his head (see para 27).

[22] A late application to amend filed with no reasonable explanation for the delay caused would invariably be frowned upon and would often prove to be fatal. In *Lembaga Pelabuhan Johor v. The Pacific Bank Bhd* [1998] 1 CLJ 742; [1998] 5 MLJ 323 the court held thus at p. 747 (CLJ); p. 323 (MLJ) C at the headnotes:

> The proposed amendments were filed at a very late stage. It was a protracted, prolonged, and inexcusable delay. The delay was precisely nine years four months and twenty days. The allegations that the proposed amendments were useless, lacked *bona fides* and intended to delay the D plaintiff's claim met with no response whatsoever by the defendant in the form of an affidavit. The defendant knew that there was this prolonged delay, yet they failed to give an explanation by way of an affidavit evidence.

[23] In *Everise Hectares Sdn Bhd v. Citibank Bhd* [2011] 2 CLJ 25 the Court E of Appeal held at p. 26 para. 3 of the headnotes:

> (3) The amendment application was not made *bona fide*. The **delay of seven months 27 days before the filing of the amendment application** showed that there was no due diligence on the appellant's part. (paras 30 & 31) (emphasis added)

F **[24]** A delay in an application to amend one's pleading without a cogent reason for the delay would invariably result in the dismissal of the application for amendment. Some cases enunciating the above principles are as follows:

G *Kuala Lumpur City Securities Sdn Bhd v. Cheong Chai Hoo* [2004] 2 CLJ 891; [2004] MLJU 170 see p. 3/3;

U-Meng Holdings Sdn Bhd & Anor v. Tan Sri Datuk Ibrahim Mohamed; Ambank (M) Bhd (Third Party) [2010] 9 CLJ 411

[25] In *Jupiter Securities Sdn Bhd v. Wan Yaakub Abd Rahman* [2002] 3 MLJ H 264 His Lordship Faiza Ramby Chik, in refusing an application to amend at the eleventh hour, held thus at the headnotes:

> (2) One of the most important criteria to amend a pleading is that the said amendment must be *bona fide*. The defendant's application was not *bona fide* because: (i) the defendant failed to disclose the purported fraud in his I original statement of defence although the facts were known to him then; (ii) **the defendant's application to amend was very late and was a 'tactical manoeuvre' to delay proceedings of the summary judgment application**;

(iii) there was no reasonable excuse for the defendant to delay the filing of his application to amend the statement of defence till two days before the hearing of the summary judgment application if the alleged facts were known to him much earlier; and (iv) **the defendant's application changed the basis of the defendant's defence to a stand inconsistent with the original statement of defence** (see pp 269G, 270A-C, H-217A).

(3) If the defendant's explanation was accepted, it would mean that the defendant was at liberty to file a statement of defence that did not disclose all the facts so that the proceedings could be delayed with an intention to amend the same later for his own personal motive. **Further, there was no reasonable ground for the defendant to wait until the last moment before the hearing of the summary judgment application to amend although more than five months had lapsed** since the application for summary judgment was served upon him (see pp 271H-272A).

(emphasis added)

[26] The defendant had based its application on the ground that it had only just found out that the plaintiff's billing for the scaffolding installed was based on cubic meter ("m3") which was not in accordance, so it claims, with industry practice in Malaysia and that the charges are excessive.

[27] The defendant further averred in its affidavit in support of the amendment application that it had discovered this information a few days before the commencement of the trial from a witness to be called for the defence, one Mr Gunalan a/l Thanimalai. However the "final revised quotation" from the plaintiff to the defendant dated 10 June 2014 clearly showed the quotation in cubic meter at p. 103 of the appeal record ("AR"). Likewise the defendant's purchase order dated 11 June 2014 to the plaintiff also referred to the measurement of the scaffolding in terms of cubic meter. The plaintiff's invoices that had been in the possession of the defendant also showed cubic meter and some payments had already been made based on cubic meter.

[28] The last case management was on 13 July 2015 and trial was initially fixed on 19 - 20 October 2015 and which taken off because defendant's counsel was taken ill. For the defendant to wait almost five months and then to say that they had stumbled upon an important discovery of something amiss in the method of billing is stretching credibility to its limits. The late application with no reasonable explanation smacks of a lack of *bona fides* in making the application.

[29] In *Raphael Pura v. Insas Bhd & Anor* [2000] 4 CLJ 830 the Court of Appeal underscored the importance of *bona fides* in applications for the amendment of defence in this wise:

As we are dealing with the application for the amendment of defence, question (1) (whether the application is *bona fide*) above would be relevant for consideration.

A This court similarly had considered O. 20 r. 5 in *Taisho Co. Sdn Bhd v. Pan Global Equities Bhd* [1999] 1 CLJ 703. In *Taisho*'s case, the amendments related to the statement of claim. Be that as it may, the question posed in *Yamaha* would still be equally applicable to the present appeal before us. **If the application, on the facts before the learned judge, showed lack of *bona fide* then he fails in his application altogether**. (emphasis added)

B

[30] In dismissing a similar late application for amendment in the *Hong Leong Finance Bhd*'s case *(supra)* the Federal Court observed as follows:

[25] The Courts in Malaysia have consistently held that where there is a delay in making an amendment application, the onus is on the applicant C to furnish a reasonable explanation for such a delay. They seem to have considered this as an additional factor to the *Yamaha Motor*'s rules. The need to show 'some material and advance some cogent reasons' was applied in *Taisho Co Sdn Bhd v. Pan Global Equities Bhd & Anor* [1999] 1 MLJ 359; [1999] 1 CLJ 703, Haidar JCA (as he then was) held:

D The learned judge intimated that the application was made after the appellant failed on appeal to this court to affirm the judgment entered by it initially. Further, he said that the appellant had knowledge of the 'acknowledgement' as late as April 1987, that is, four years before the action was filed. Furthermore, the application was filed four years after the commencement of this action. *We* E *would add further that no reasons were given for the delay in filing the application when the point of admission was obviously available even before filing the proceedings. As rightly opined by the learned JC in Multi-Pak Singapore Pte Ltd and correctly followed by the learned judge, the appellant did not place some material and advance some cogent reasons to impel the court to lean on its side*. We would further add that the application F borders on lack of *bona fides*, one of the basic question set out in *Yamaha Motor Co Ltd*. (emphasis added.)

[31] The requirement to advance some material and cogent reasons was likewise followed in the subsequent decisions in the cases of *Raphael Pura v. Insas Bhd & Anor* [2000] 4 CLJ 830; [2001] 1 MLJ 49; and *Everise Hectares* G *Sdn Bhd v. Citibank Berhad* [2011] 2 CLJ 25; [2010] MLJU 1379:

[26] It is to be stated here the requirement that a cogent explanation for such a delay must be furnished when making a late application to amend would be clearly in line with pre-trial case management procedures (introduced in year 2000). The management of cases by the courts prior H to the trial is intended to ensure 'just, expeditious and economical disposal' of an action (see O. 34 r. 4(1) of the RHC 1980, now O. 34 r. 1(1) of the RC 2012) and the Practice Direction No 2 of 2014 issued by the Chief Judge of High Court in Malaya). Timely disposal of cases and the limitation of cost are now the primary considerations under the present regime.

I [27] In our instant case, *there had been five case managements since 2011 and there was no indication at all that an amendment application was contemplated by the defendant. The only explanation given by the defendant in his affidavit for the*

delay was that he had only discovered that these new issues were not pleaded when preparing for trial. Such an explanation in our view surely cannot be acceptable. (emphasis added)

[32] Based on this ground of undue delay which has not been reasonably explained, the defendant's late application after trial had commenced should stand dismissed.

Whether The Late Application To Amend By The Defendant Would Prejudice The Plaintiff

[33] The late proposed amendments that made reference to what is industry practice would entail the calling of expert witness to testify. The need to call an expert witness should have been disclosed to the SCJ at the stage of case management for there specific directions that should be given under the Rules of Court 2012 where expert evidence is envisaged, all with a view to securing the just, expeditious and economical disposal of the proceedings.

[34] Under O. 34 r. 2(2)(p), (q) and (r), with respect to the directions that a judge may make on a pre-trial case management where expert witnesses may be called, it is provided as follows:

(2) At a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made **to secure the just, expeditious and economical disposal of the action or proceedings, including**:

...

(p) whether an order should be made **limiting the number of expert witnesses**;

(q) whether the evidence-in-chief of each expert witness should be set out in a single witness statement;

(r) whether any direction should be given *for a discussion between the experts prior to the exchange of their affidavits exhibiting their reports for the purpose of requiring them to identify the issues in the proceedings and where possible, reach agreement on an issue*, and if such a direction should be given, whether:

(i) to specify the issues which the experts are to discuss; and

(ii) to **direct the experts to prepare a joint statement indicating the agreed issues, the issues not agreed and a summary of the reasons for any non-agreement**;

(emphasis added)

[35] Order 40A of the ROC 2012 further amplify the specific directions that the court may make when it is indicated to the court that a party is calling an expert to testify on certain issues. It provides as follows:

ORDER 40A: EXPERTS OF PARTIES

1. Limitation of expert evidence (O. 40A r. 1)

(1) The Court may, at or before the trial of any action, by order limit the number of expert witnesses who may be called at the trial to such number as it may specify.

(2) A reference to an "expert" in this Order is a reference to an expert who has been instructed to give or prepare evidence for the purpose of Court proceedings.

2. Expert's duty to the Court (O. 40A r. 2)

(1) It is the duty of an expert to assist the Court on the matters within his expertise.

(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

3. Requirements of expert's evidence (O. 40A r. 3)

(1) Unless the Court otherwise directs, expert evidence to be given at the trial of any action, is to be given in a written report signed by the expert and exhibited in an affidavit sworn to or affirmed by him testifying that the report exhibited is his and that he accepts full responsibility for the report.

(2) An expert's report shall:

(a) give details of the expert's qualifications;

(b) give details of any literature or other material which the expert witness has relied on in making the report;

(c) **contain a statement setting out the issues which he has been asked to consider and the basis upon which the evidence was given**;

(d) if applicable, state the name and qualifications of the person who carried out any test or experiment which the expert has used for the report and whether or not such test or experiment has been carried out under the expert's supervision;

(e) **where there is a range of opinion on the matters dealt with in the report**:

(i) **summarise the range of opinion; and**

(ii) **give reasons for his opinion;**

(f) **contain a summary of the conclusions reached;**

(g) **contain a statement of belief of correctness of the expert's opinion; and**

(h) **contain a statement that the expert understands that in giving his report, his overriding duty is to the Court and that he complies with that duty.**

4. Written questions to expert (O. 40A r. 4)

(1) A party may with the leave of the Court put to an expert instructed by another party written questions about his report.

(2) An application for leave to put questions to an expert about his report shall be made within fourteen days of service of the expert's affidavit exhibiting his report, or such longer period as the Court may allow.

(3) The written questions under paragraph (1) shall be for the purpose only of clarification of the report.

(4) An expert's answers to the written questions put to him under paragraph (1) shall be in writing and provided within such time as the Court may direct and shall be treated as part of the expert's report.

(5) Where a party has put a question to an expert instructed by another party in accordance with this rule and the expert does not answer the question or does not, in the opinion of the Court, answer the question adequately within the time provided, the Court may make such order as it thinks just, including all or any of the following:

(a) that the party who instructed the expert may not rely on the evidence of that expert;

(b) that the party who instructed the expert may not recover the costs of that expert from any other party; or

(c) that the expert is to answer or provide a further and better answer to the question, as the case may be.

5. Discussions between experts (O. 40A r. 5)

(1) The Court may, at any stage, **direct a discussion between experts for the purpose of requiring them to**:

(a) **identify the issues in the proceedings; and**

(b) **where possible, reach agreement on an issue.**

(2) **The Court may specify the issues which the experts shall discuss**.

(3) **The Court may direct that following a discussion between the experts, they shall prepare a statement for the Court showing**:

(a) **the issues on which they agree; and**

(b) **the issues on which they disagree and a summary of their reasons for disagreeing.**

(4) The contents of the discussions between the experts shall not be referred to at the trial unless the parties agree.

A (5) Where the experts reach agreement on an issue during their discussions, the agreement shall not bind the parties, unless the parties expressly agree to be bound by the agreement.

(emphasis added)

B **[36]** The court has been deprived of the opportunity to make the above specific directions with respect to expert evidence and the delay caused can only prejudice the plaintiff for it would set the trial back a few more months at a time when the plaintiff had already filed and served its witnesses' statements on the defendant. It would delay the trial further as the plaintiff would have to get their expert witness, an expert report would have to be C prepared and the plaintiff's first witness, who had given evidence in chief, would have to be recalled as his witness statement would in all probability have to be revamped.

[37] No longer may a court simply dismiss the delay caused arising out of such a late amendment as merely a prejudice that can always be compensated D by costs. Costs alone cannot make prejudice caused more prosaic or palatable. It cannot always atone for or assuage the deleterious delay that has resulted in the prejudice.

[38] We must move away from the general default drive that any prejudice E caused may be compensated by costs. The reformatted regime eschewing delay and encouraging efficiency must bring in its wake a new sense of value in rewarding timeous action and discouraging delay that disrupt the diligent disposal of disputes in the courts.

[39] I have no difficulty associating with the sentiments expressed in F *Anthony Wee Soon Kim v. UBS AG (No 2)* [2003] 2 SLR 554 where in dismissing the plaintiff's application the court was sagacious in stressing as follows:

> Litigants must be aware that with increased emphasis on the efficient conduct and disposal of cases, they must be responsible in the way they G conduct their cases. The fact that a litigant is able to pay costs and a proposed amendment will not cause prejudice or irreparable prejudice to its adversary will not ensure that an application to amend will be granted.

[40] In a world where money is often perceived as having the power to cure all ills, the reminder in *Ketteman and Others v. Hansel Properties Ltd* [1988] H 1 All ER 38 where at p. 62 where it was said that justice cannot always be measured in terms of money, is both timely and timeless. The Federal Court in *Hong Leong Finance's* case (*supra*) referred to the development in UK law on this misconception that an order for costs would remove all prejudice caused as follows:

I [19] The development of the law relating to civil procedure and in particular with regard to amendment application on pleadings is not only seen in Malaysia but in other jurisdictions as well. In the United Kingdom as far back as 1988, the House of Lords in the decision of *Ketteman and*

Others v. Hansel Properties Ltd [1988] 1 All ER 38 had already taken into consideration the strain of litigation on parties when new issues are introduced and an amendment application is made late. The statement of a general principle against delayed amendment was well set out by Lord Griffiths in that case at p. 62 as follows:

> Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore, to allow an amendment before a trial begin, it is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.
>
> Another factor that a *judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently*. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings. (emphasis added.)

The principle in *Ketteman* has been considered on numerous occasions by the Malaysian Courts (see the case of *Skrine & Co v MBf Capital Bhd & Anor* [1998] 3 MLJ 649 and *Bacom Enterprises Sdn Bhd v. Jong Chuk & Ors* [1998] 2 MLJ 301).

[41] The defendant's late application for amendment which, if allowed, would cause the trial to be further delayed, is a prejudice to the plaintiff which cannot be compensated by costs.

Whether The Proposed Amendment Changes The Character Of The Defence

[42] The defendant had proposed to amend its defence by adding substantially five paragraphs to its defence from paras. 48 - 52 to include the defence of set-off. However though couched as a set-off, it is in essence a camouflage for a counter claim. As pointed out by learned counsel for the plaintiff, a perusal of the proposed amended defence discloses that the defendant's basis for this proposed set-off is that:

(i) the defendant had "overpaid" the plaintiff a sum of RM71,943.30 on some of the invoices the defendant had paid (see para. 49 of the proposed amended defence); and

(ii) the unpaid sum of RM178,084.50 "billed in excess" by the plaintiff and as yet unpaid ought to be set-off against the plaintiff's total claims (see para. 51 of the proposed amended defence)

[43] I agree with the plaintiff's submission that the defendant's plea is not a real set-off:

(i) the "overpaid" sum of RM71,943.30 is not a sum to be set-off from the plaintiff's claim. It is, if at all, a counterclaim for moneys overpaid through mistake (which is not admitted); and

(ii) the sum of unpaid RM178,084.50 "excess" is not a real set-off. It is the sum the defendant ought to try to establish is not owing to the plaintiff at trial and accordingly reduce the plaintiff's claim.

[44] The whole tenor and thrust of the defence is three fold:

(i) that there has been wrong calculations in that there is a vast difference between the plaintiff's claims made and the drawings and report of the defendant's site personnel;

(ii) that there has been overcharging bases on the works verification forms which were tampered by the plaintiff; and

(iii) that there were wrong measurements where height is concerned.

A perusal of para. 45 of the original defence, at "Kesimpulan Pembelaan" is instructive. It pleads thus:

> 45. Defendan bersedia membayar sebarang tuntutan daripada Plaintif yang berasaskan terma-terma dan butir-butir dalam surat sebut harga dan **yang mengandungi kuantiti dan ukuran yang betul dan benar**.
>
> (i) Jumlah tuntutan Plaintif berasaskan kepada invois-invois yang dikeluarkan oleh Plaintif kepada Defendan berasaskan **cara pengiraan yang tidak menurut surat sebut harga** yang menjadi asas Perjanjian Plaintif dan Defendan; maka jumlah tuntutan RM715,381.79 oleh Plaintif terhadap Defendan tidak mempunyai merit;
>
> (ii) Jumlah tuntutan Plaintif terhadap Defendan berasaskan surat pengesahan rekod kerja atau **"S.I." yang cacat dari segi kandungannya serta mengandungi butir-butir yang salah**:
>
> (iii) ...

(iv) Defendan bersedia dan mampu daripada awal lagi dan masih bersedia untuk membayar tuntutan Plaintif yang disokong oleh butir-butir kerja yang benar dan mengikut terma-terma yang dipersetujui dalam kontrak antara Plaintif dan Defendan. (emphasis added)

[45] In none of the contemporaneous documents exhibited was there any reference to a set-off. Neither was there any reference to the plaintiff's invoices being defective because it "... includes calculation of empty space ..." or "... not in accordance with industry practice," as alleged in paras. 48 - 49 of the proposed amended defence." There is merit in the plaintiff's submission that the new allegations would go against the grain of the defendant's own contemporaneous documents and pleaded defence. Indeed the so-called "set-off" is more of a tactical manoeuvre to disguise what is in reality a "counterclaim" so as to avoid the obvious pitfall of making an application for amendment to add a counterclaim after trial has proceeded. It is tantamount to shifting the goal post after trial has started and the "match" as it were, has begun.

[46] There is considerable force in the plaintiff's argument that it is improbable that the defendant, being involved in a multimillion dollar project and employing professionals, did not know of this "industry standard or practice" issue at the outset of the suit.

Pronouncement

[47] The Sessions Court Judge had exercised her discretion correctly and had dismissed the defendant's late application for amendment of its defence based on settled and sound principles governing applications for amendments. For all the factors considered above, I would affirm the decision of the Sessions Court and dismiss the appeal with costs of RM8,000 to be paid by the defendant to the plaintiff, which costs is to be paid by the end of the trial in the Sessions Court.

[48] The matter should proceed with all due diligence on the next trial date in the Sessions Court on 20 January 2016 and on subsequent dates fixed.